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No. 96-91

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CSX TRANSPORTATION, INC.,
Petitioner,

v.

LANZY WILSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a suit under the Federal Employers' Liability Act is settled without expressly addressing the railroad's liability for future acts of negligence, may the employee subsequently claim damages under the FELA for injuries suffered after the release was executed, and which were proximately caused by new acts of negligence?

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MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case presents no significant issues of federal law. The decision of the Sixth Circuit Court of Appeals and its interpretation of Section 5 of the FELA, 45 U.S.C. § 55, is fully supportable on both the law and on the facts. A release which does not expressly address the question of relieving a railroad from liability for future acts of negligence cannot be used to defeat a claim for damages brought pursuant to the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.*, for injuries suffered by a railroad employee after the release was executed and which were proximately caused by the railroad's negligence, also occurring after the release was executed.

STATEMENT OF THE CASE

The Statement of the Case set forth in the Petition for a Writ of Certiorari does not fully and completely apprise this Court of all of the underlying facts giving rise to this appeal. Respondent Lanzy Wilson filed an FELA action in Alabama to recover for pulmonary injuries he sustained in the course and scope of his employment with the respondent, CSX Transportation, Inc. (hereinafter "CSXT"). That action was settled and on September 30, 1991, Mr. Wilson executed the release which is presently in issue.

After executing the release, both Mr. Wilson's physicians and the railroad's physicians returned him to his position as a maintenance-of-way foreman for CSXT. While so employed, in 1993 and early 1994, Mr. Wilson was exposed to excessive rock dust, and his inhalation of same, without adequate respiratory protection, required hospitalization for as long as two weeks at a time.

Mr. Wilson again brought suit seeking to recover for the new injury sustained as the proximate result of the railroad's negligence in failing to provide him with a reasonably safe place to work and in failing to provide him with reasonably appropriate breathing protection after his return to work. Further, plaintiff alleged that the railroad was negligent in assigning him to work which it knew or should have known was medically dangerous to him.

Relying on the release, CSXT sought summary judgment in the district court. The record adduced in the district court on the Motion for Summary Judgment establishes that after Mr. Wilson had returned to work, he had on numerous occasions requested of his supervisor that he not be assigned to a job exposing him to excessive rock dust without adequate respiratory protection.[1] The supervisor refused such request, stating that he did not care about Mr. Wilson's medical problems. The record

[1] In fact, one of Mr. Wilson's fellow foremen even offered to switch jobs with him, so Mr. Wilson would not be forced to work under those conditions.

below also establishes that the railroad failed to provide Mr. Wilson with adequate breathing protection. In particular, the record reflects that Mr. Wilson was assigned to work on and around a yardbroom, which is a large piece of machinery about the size of a locomotive, that operates on the rail and cleans the ballast (rock) which makes up the roadbed. Despite knowing that breathing protection was essential, the railroad never provided Mr. Wilson with anything more than a small yellow paper dust mask for breathing protection, which Mr. Wilson contended was inadequate and negligent for any worker, let alone one with his known medical history.

Substantial unrebutted medical testimony from board certified pulmonologists was also submitted in the district court. This testimony established that Mr. Wilson's assignments into a dust-filled environment subsequent to the release and which required hospitalization, caused new injury upon the new exposures. In both the district court and in the court of appeals, Mr. Wilson contended that the release here in issue did not address the question of future negligent conduct by the railroad. He further contended that such new injuries, occurring subsequent to the execution of the release, were not intended to fall within the language of the release and further, that if they were, the release purported to exempt the railroad from liability for new acts of negligence in violation of Section 5 of the FELA, 45 U.S.C. § 55.

The trial court found that the release barred the present action, but did not address the issue of how Section 5 impacted upon the validity of the release. The Sixth Circuit did address this issue and interpreted Section 5 as precluding the railroad's ability to release itself from the consequences of new injury caused by new negligence since, to suggest otherwise, would enable employers "to treat their employees with impunity." (Op. at 6a).[2]

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[2] For the convenience of the Court, all citations to the decision of the Court of Appeals will be to the opinion attached to the Petition.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' INTERPRETATION OF 45 U.S.C. § 55 DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR OF OTHER COURTS OF APPEAL

The case at bar is concerned with a release entered into between the parties on September 30, 1991, settling a suit brought by the Respondent to recover for injury to his respiratory system. The settlement of claims is certainly to be encouraged. However, it is Respondent's position that an interstate rail carrier such as the Petitioner, which is subject to all of the provisions of the Federal Employers' Liability Act, cannot obtain from its injured employee a broadly worded release the practical effect of which would relieve the railroad from liability for the consequences of its separate, new and independent acts of negligence some time in the future. The Sixth Circuit Court of Appeals accepted this contention and determined that if the trier of fact concluded that Petitioner had sustained a new injury caused in while or in part by the railroad's negligence, the release would not absolve the railroad from liability.

In the first instance, this is nothing more than a case of contract interpretation. The release in issue here was never intended to operate so as to prohibit an employee from suing for post-release negligence and from recovering for that negligence, as Respondent consistently argued in the lower courts. Although the Court of Appeals did not expressly address that question, construction of the release as including post-execution injuries and acts of negligence is a necessary predicate of the legal question that Petitioner seeks to have this Court decide. And if, as Respondent contends, the release is construed otherwise, particularly in light of the general policy under the FELA as under most states' workers compensation schemes to bar contractual devices to avoid liability for future occupational injuries, then the Petitioner's question

presented simply would not be presented in this case. Thus, even if the legal question, whether a release of claims based on future injuries and future negligence would be valid under Section 5, were the subject of disagreement among lower courts—and, as we show below, it is not—this would not be the proper case in which to decide that question.

None of the circuit court decisions which the railroad contends are in conflict with the Sixth Circuit decision here are even remotely in point. In *Bay State Dredging & Contracting Co. v. Porter*, 153 F.2d 827 (1st Cir. 1946), the court was concerned with an accrued claim for damages. No opinion was voiced regarding the applicability of a release to an unaccrued, *i.e.*, new injury, claim such as was presented by Mr. Wilson in the instant case. In *Panichella v. Pennsylvania R.R.*, 268 F.2d 72 (3d Cir. 1959), *cert. denied*, 361 U.S. 932 (1966), the issue was whether a release entered into between the railroad and the employee also released a third party defendant impleaded by the railroad. In *Heagney v. Brooklyn East. Dist. Term.*, 190 F.2d 976 (2d Cir. 1951), the issue was whether the acceptance of workers' compensation benefits constituted a waiver of FELA rights. And in *Good v. Pennsylvania R.R.*, 384 F.2d 989 (3d Cir. 1967), the issue was not one of release at all, but whether the plaintiff could disavow an oral settlement agreement reached at a pre-trial conference.

These decisions do not conflict with the Sixth Circuit's decision in the case at bar. At best, they merely cite *Callen v. Pennsylvania R.R.*, 332 U.S. 625 (1948) as dictum.[3] The decision most closely analogous to the instant case is, as appropriately noted by the Sixth Circuit, *Cordiano v. Consolidated Rail Corp.*, 87 Ohio App.3d 398, 622 N.E.2d 406 (1993).[4] As in the case at bar, a

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[3] *Callen* will be discussed in greater detail *infra*.

[4] CSXT apparently belittles this decision because it emanates from an intermediate state appellate court. Yet, Congress has

summary judgment motion was brought by the railroad to test the applicability of a release for a hearing loss claim to a new claim for hearing loss. Relying on Section 5, the *Cordiano* court concluded that "[t]he language of the release does not encompass an additional hearing loss due to an entirely different accident that resulted in a new injury to Cordiano's ears." 87 Ohio App.3d at 402.

The railroad seizes upon the words "different accident" in an attempt to distinguish *Cordiano* from the instant case. CSXT is apparently willing to concede that if, as a result of its negligence, an employee fractures a leg, settles his claim and signs a release, and thereafter, again due to the railroad's negligence, suffers yet a new and different fracture of the same leg, the earlier release will not bar the subsequent claim. However, the railroad attempts to distinguish that factual situation and wants this Court to make the unwarranted assumption that Mr. Wilson's post-release unprotected exposure to rock dust is not a new or different accident.

The Court of Appeals saw through this rather disingenuous argument. There is absolutely no basis upon which to draw the distinction the railroad purports to create between traumatic injury and occupational disease injury. Certainly, there is nothing within the language of the FELA itself which differentiates between the types of injuries. To accept the railroad's contention would permit it to avoid its legal obligations under the FELA with respect to those employees with occupational injury who are returned to work and injured anew by the negligence of the railroad.

To illustrate: Assume that two employees, A and B, are available to clean up a toxic spill. A has previously released a claim for pulmonary injury; B has healthy

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decreed that state courts have concurrent jurisdiction in FELA cases, 45 U.S.C. § 56. There is no reason to believe that the decision is not persuasive authority on the issue presented, or that these jurists are incapable of analytic and intellectual thought.

lungs. Under the railroad's view of this case, it could send Employee A to work at the toxic site without any protection from the effects of the toxic spill and, indeed, would have an incentive to do so because of the release. Moreover, the railroad would have absolutely no incentive to protect the safety of Employee A because the release previously signed by A would forever bar him from prosecuting an action for injury to his lungs as the result of the negligent future conduct of the railroad.

Clearly, when it enacted the FELA, Congress did not envisage such a scenario. This Court has often stated that the FELA was enacted as a

> . . . response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their safety.

Sinkler v. Missouri Pac. R. R. 356 U.S. 326, 329 (1958). *See also, Consolidated Rail Corp. v. Gottshall,* —— US. ——, 114 S Ct. 2396 (1994). Allowing a prior release to preclude recovery for future negligent conduct is inimical to the purposes of the Act. Accordingly, the humanitarian purpose of the FELA would best be served if the Petition for Writ of Certiorari is denied and the decision of the Court of Appeals be allowed to stand.

The decision below, and thus the question that Petitioner seeks to bring to this Court, turns on the distinction drawn by the Sixth Circuit between injuries and acts of negligence occurring up through the time of the release, and injuries and acts of negligence occurring thereafter. It cannot be emphasized too strongly that the medical testimony in this case established that with the post-release negligent assignments to the yardbroom and unprotected exposure to rock dust, Respondent sustained a new injury. As one of Mr. Wilson's treating board certified pulmonologists testified at deposition, the inhalation of the rock dust resulted in repeated injury to the lungs and added new injury on top of old injury.

Mr. Wilson seeks compensation only for the new injury he sustained subsequent to the 1991 release, when the railroad negligently assigned him to tasks exposing him to rock dust without providing adequate breathing protection.[5] The decision of the Court of Appeals in this case does nothing more than recognize that whether there was new and independent negligence and that whether Mr. Wilson sustained a new injury occasioned by such negligence occurring subsequent to the release were issues to be decided by the trier of fact. *Accord Aparicio v. Norfolk & W. Ry.*, 84 F.3d 803, 815 (6th Cir. 1996), decided shortly after the instant case, in which the court held that for statute of limitations purposes, whether the injury was new or separate, or whether it was a continuation of the old injury, was a question of fact.

In its Petition, the railroad does not dispute this portion of the Sixth Circuit decision. What the railroad does suggest is that under *Callen v. Pennsylvania R.R.*, 332 U.S. 625 (1948), a release can be used to defeat liability for its subsequent negligent acts regardless of the factual circumstances. This is a totally distorted interpretation of *Callen*. The crux of *Callen* is contained in this Court's definition of a release that it "is a means of compromising a claimed liability . . ." 332 U.S. 631 (emphasis supplied). The Court went on to state that "[w]here controversies exist as to whether there is liability . . . Congress has not said that parties may not settle their claim. . ." *Id.* (emphasis supplied).

Callen thus makes it clear that a release falls outside of the operation of Section 5 of the FELA only with respect to claims which had arisen or accrued at the time the release was executed. Properly construed, *Callen* stands for nothing more than the principle that one can settle or compromise an existing FELA claim and cannot

[5] Petitioner submits that the breathing protection actually provided by the railroad was inadequate and improper for all employees, not just himself.

later avoid the binding effect of the release because he then feels somehow disadvantagd.

On the other hand, there is nothing in *Callen*, or in any other pronouncement of this Court which would nullify the ultimate conclusion of the court below to the effect that Section 5 prevents contracts, including releases, from being used to extinguish FELA rights as to claims which have not yet arisen.

This Court, being "mindful of the benevolent aims of the Act, . . . [has] jealously scrutinized private arrangements for the bartering away of federal rights . . ." *South Buffalo Ry. v. Ahern*, 344 U.S. 367, 372-73 (1953) (citations omitted). The release at issue here, as correctly interpreted by the Sixth Circuit, does exactly that. It purports to deprive Mr. Wilson of the right to sue the railroad for injuries proximately caused by the railroad's negligence committed after its execution and, in the words of the Sixth Circuit, "would enable [the railroad] to treat [its] employees with impunity." (Op.at 6a).

Section 5 of the FELA

> . . . declares a public policy to void releases or other exculpatory devices procured under circumstanes that indicate an attempt to avoid Federal Employers' Liability Act liability . . .

Kozar v. Chesapeake & O. Ry., 320 F. Supp. 335, 384-85 (W.D. Mich. 1970), *aff'd in part and vacated in part on other grounds*, 449 F.2d 1239 (6th Cir. 1971) (emphasis deleted). The release in the case at bar is precisely the type of contract or device Congress meant to proscribe when it enacted Section 5. Shortly after its passage, this Court construed Section 5 broadly as including every variety of agreement or arrangement which had as its purpose the avoidance of FELA liability. *Philadelphia B. & W. R.R. v. Schubert*, 224 U.S. 603 (1912). Significantly, in construing the statutory phrase "the purpose or intent of which shall be to enable any common carrier

to exempt itself from any liability created by this act," this Court stated that "the purpose or intent" of such devices "is to be found in their necessary operation and effect in defeating the liabiilty which the statute was designed to enforce." *Id.*

Schubert does not involve a release but, as this Court made clear, substance must control over form. Courts are to look at the effect of the particular agreement and not at the title the parties choose to give it. Moreover, contrary to the contention advanced by the railroad, the release in issue, like the agreement before the Court in *Schubert,* was made prior to the injury for which suit was brought. Again, after Mr. Wilson signed the release and returned to work, he was negligently exposed to the deleterious effects of rock dust and this exposure, as stated by the medical testimony, caused a new injury. Under Section 5, the release cannot be utilized by the railroad to avoid its liability under the FELA for the new injury caused by its post-release negligence. *Cf. Duncan v. Thompson,* 315 U.S. 1,4 (1942), in which this Court indicated that *Schubert* controls in cases, such as the case *sub judice,* where the agreement is made prior to the injury.

Accordingly, the Sixth Circuit correctly concluded that *Schubert* is the controlling precedent to be applied in this case. *Callen,* notwithstanding its broad statements that releases are outside the scope of Section 5, is distinguishable on its facts as it is concerned with a singular injury and applies only to a subsequent action for the same incident that was the subject of the release. It cannot and should not be read as a mandate to railroads to return its employees to work and negligently injure them without fear of FELA liability.

II. THE DECISION OF THE COURT OF APPEALS WILL HAVE NO ADVERSE CONSEQUENCES ON THE SETTLEMENT OF FELA OCCUPATIONAL INJURY CLAIMS

The railroad grossly mischaracterizes the effect the decision below will have on future FELA occupational disease settlements. It contends that cases would never be settled because new claims could always be brought. Yet, for whatever appeal that argument may have, it must yield to the Congressional intent behind the FELA. As one court has stated with respect to the very argument advanced by the railroad:

> However, is such freedom of contract inherently more valuable than the policies that Congress intended the FELA to promote? A reading of 45 U.S.C. § 55 indicates that Congress intended to remove the ability of employees to sell off their FELA rights in exchange for short term gains as well as the ability of employers to pressure or defraud their employees into signing away those same rights . . .
>
> In the instant case, the release goes beyond merely compromising a claimed liability and purports to exempt Defendant for all FELA liability arising out of Plaintiff's employment. The fact that Plaintiff was injured in an accident and reached a settlement with the employer should not serve to lift the restriction on employers from attempting to escape FELA liability by written instrument.

Brophy v. Cincinnati, N.O. & T.P.R.R., 855 F.Supp. 213, 216 (S.D. Ohio 1994).

In the case at bar, the Respondent, Lanzy Wilson, is not seeking to recover for an "old" released injury under the guise of a new theory of recovery. All Mr. Wilson seeks is compensation for the worsening of his pulmonary condition caused by new and distinct acts of employer negligence, committed after the 1991 release had been executed. Respondent respectfully submits that such re-

lease was never intended to cover that eventuality but, even if such intent could be read into the release, it would clearly run afoul of Section 5 of the FELA.

On balance, the right of an FELA claimant to his federally created statutory right must weigh much more heavily than the perceived inability to settle cases.[6] The real impact of adopting the Petitioner's position would be to grant not only this railroad, but all common carriers by rail, the virtually unlimited right to "legally" injure and, indeed, even kill employees by use of a cleverly crafted release designed to exculpate itself from future acts of negligence.

CONCLUSION

This Court should deny a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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[6] Indeed, all the Sixth Circuit has done is delegate to the trier of fact the issues of whether Petitioner sustained a new injury and, if so, whether the injury was proximately caused by the railroad's negligence, no matter how slight. *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957). Only after this factual inquiry is resolved does the applicability of the release come into play.